Supreme Court, U.S.
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No. 96-1757

In the
Supreme Court of the United States
October Term, 1996

JOYCE E. HOLTZMAN,

Petitioner,

v.

THOMAS P. MULLON, individually and as Director of Veterans Administration Medical Center; DEPARTMENT OF VETERAN AFFAIRS, an agency of the United States of America; JESSE BROWN, as Secretary of Veteran Affairs; and REGENTS OF THE UNIVERSITY OF MINNESOTA, a "body corporate" under the Constitution of the State of Minnesota,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT REGENTS OF THE UNIVERSITY OF MINNESOTA'S BRIEF IN OPPOSITION

MARK B. ROTENBERG
General Counsel
University of Minnesota
BY: JULIE A. SWEITZER
(*Counsel of Record*)
Acting Deputy General Counsel
325 Morrill Hall
100 Church Street S.E.
Minneapolis, MN 55455
(612) 624-4100

Attorney for Respondent Regents of the University of Minnesota

1997 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTIONS PRESENTED

Whether the Eighth Circuit Court of Appeals' accurate analysis of the relationship between petitioner and respondent, which is consistent with petitioner's sworn testimony and the respondent's discovery responses, compels the exercise of judicial discretion to grant a writ of certiorari.

Whether the Eighth Circuit Court of Appeals' consistent application of its own multiple decisions recognizing the University of Minnesota's immunity under the Eleventh Amendment of the United States Constitution, which are not and cannot be in conflict with any other circuit court of appeal because they have not addressed the University of Minnesota's status, compels the exercise of judicial discretion to grant a writ of certiorari.

Whether the Eighth Circuit Court of Appeals' determination, consistent with its previous decisions, that the Regents of the University of Minnesota is not a "person" against whom a due process claim could be asserted, nor was there a constitutionally cognizable interest affected, compels the exercise of judicial discretion to grant a writ of certiorari.

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STATEMENT OF THE CASE

Contrary to petitioner's statement on page 2 of her petition that she went to the University of Minnesota's personnel office and responded to a job posting, petitioner and her husband, Dr. Jordan Holtzman, testified that Dr. Holtzman made the decision to hire his wife before any application process was determined, and generally preselected his staff. App. 6, 11 (Citations to "App." refer to Petitioner's Appendix.) Not only did petitioner's husband hire his wife, but according to both petitioner and Dr. Holtzman, Dr. Holtzman had the sole authority to hire and/or fire petitioner. *Id.* Dr. Holtzman set petitioner's working hours. App. 11. Petitioner informed Dr. Holtzman if she was ill and if she wished to take vacation. Dr. Holtzman signed her timecards. *See* App. 11. He directed and supervised her work. App. 11.

All of petitioner's duties as a nurse were performed at the Veterans Administration Medical Center ("VAMC"), a federal entity unrelated to the University of Minnesota. App. 6-7. All of her work was performed with VAMC clinical patients. *Id.* Her VAMC "without compensation" ("WOC") status was a requirement to perform these functions. App. 6.

Petitioner's position was funded by drug company research funds obtained by Dr. Holtzman and used solely for his clinical responsibilities for his appointment as Staff Physician and Chief, Therapeutic Section at the VAMC. App. 6, 11. Dr. Holtzman deposited his drug company research funds in an account at the Minnesota Medical Foundation, an entity separate from the University of Minnesota. App. 11. Dr. Holtzman was the only one who controlled those funds and their distribution. App. 6, 11. The only entities informed of the financial status of the accounts were the Minnesota Medical Foundation, the VAMC, and the Internal Revenue

Service. Dr. Holtzman transferred portions of the funds to a University of Minnesota account to cover payroll expenses. App. 11. Petitioner submitted her timecards to the University of Minnesota, and a paycheck was processed from the funds designated by Dr. Holtzman as transferred from the Minnesota Medical Foundation.

Petitioner received no vacation, no sick pay, no holiday pay, no health insurance, and no disability insurance from the University of Minnesota. App. 11. She did not get paid if she did not work. It is undisputed that petitioner stopped working at the VAMC and stopped submitting timecards to the University of Minnesota as of August 7, 1990.

Petitioner acknowledged that a VAMC employee was responsible for the decision to terminate her WOC status. Pet. 6-7. Petitioner knew she needed without compensation "WOC" status at the VAMC in order to perform her duties, and that only the VAMC determined WOC status. App. 6, Pet. 3. No one at the University of Minnesota took any action to terminate petitioner.

REASONS FOR DENYING THE WRIT

I.
THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ALL STATEMENTS BY THE UNIVERSITY

Petitioner inexplicably ignores the express terminology of the Rule 36 admission on which petitioner relies, in which the Regents acknowledge a relationship with petitioner "for some purposes but not for others." Pet. p. 9. The University has never admitted that petitioner was an employee for purposes of Title VII.

Certainly the University has acknowledged a payroll function, which is one, but only one, of a host of many possible elements of an employment relationship. *See Wilde v. County of Kandiyohi*, 15 F.3d 103 (8th Cir. 1994). The district court and the Eighth Circuit Court of Appeals accurately acknowledged the existence of the payroll function, but conclude that the limited administrative function did not constitute an employment relationship as required under Title VII in light of the overwhelming evidence that petitioner was selected and supervised by her husband Dr. Holtzman, all while performing her duties exclusively on the premises of and for the patients of the federal hospital. App. 10-12. As the district court found, "the University had no control over the means and manner of the Holtzman's performance." App. 11.

Petitioner's own failure to carefully review discovery statements is not a basis to object when the district court and the Eighth Circuit acted consistent with the express terminology. App. 3, 12. There was no departure from the

accepted course of judicial proceedings, and there is no reason to require this court's supervision.

II.
THE EIGHTH CIRCUIT COURT OF APPEALS ACTED CONSISTENTLY WITH ITS REPEATED AND CAREFUL RECOGNITION OF THE ELEVENTH AMENDMENT IMMUNITY OF THE REGENTS OF THE UNIVERSITY OF MINNESOTA

The Eighth Circuit Court of Appeals has repeatedly and consistently recognized the Eleventh Amendment immunity of the University of Minnesota as an instrumentality of the State. App. 3; *Treleven v. University of Minn.*, 73 F.3d 816 (8th Cir. 1996); *Richmond v. Board of Regents of Univ. of Minn.*, 957 F.2d 595, 598-99 (8th Cir. 1992); *Schuler v. University of Minn.*, 788 F.2d 510, 516 (8th Cir. 1986), *cert. denied,* 479 U.S. 1056 (1987); *Walstad v. University of Minn. Hosp.*, 442 F.2d 634, 641-42 (8th Cir. 1971).

There is no conflict among the Eighth Circuit Court of Appeals decisions. Petitioner suggests that the most recent Eighth Circuit ruling regarding the University's Eleventh Amendment immunity, *Treleven,* is somehow unreliable because it does not engage in any "factual analysis" as suggested by *Sherman v. Curators of University of Missouri,* 16 F.3d 860 (8th Cir. 1994). Pet. p. 20. To the contrary, the Eighth Circuit in *Treleven* specifically addressed the *Sherman* analysis and expressly rejected the same arguments made here by petitioner. "We do not think that *Greenwood* and *Sherman* cast any doubt on our holding in *Walstad.*" *Treleven,* 73 F.3d at 818; (citing *Sherman v. Curators of the Univ. of Mo.,* 16 F.3d 860 and *Greenwood v. Ross,* 778 F2d 448 (8th Cir. 1985)).

As the *Treleven* opinion indicates, the factors argued by appellant are appropriate only when there is an Eleventh Amendment question of first impression. *Treleven,* 73 F.3d at 819. Instead here the many prior decisions of the Eighth Circuit Court of Appeals formally and finally establish the University's role as an instrumentality of the state entitled to share in its Eleventh Amendment immunity. *Id.*, App. 3.

It is troubling to note that the "facts" presented by petitioner on page 21, specifically the *University of Minnesota Annual Report*, were never presented to the district court or the Eighth Circuit Court of Appeals. It is a fundamental rule of appellate practice that the record on appeal consists only of documents filed in the district court. Fed. R. App. P. 10. Petitioner's repeated attempt to create a factual record on appeal which did not exist in the district court, and to which the University has not had the chance to respond, is inexcusable.

Petitioner irresponsibly alleges a conflict with other circuits, yet fails to provide any citations to any decision in any other circuit, yet alone one in conflict with the Eighth Circuit Court of Appeals. Pet. p. 23. Indeed there can be none, for there are no other Court of Appeals decisions involving the status of the University of Minnesota. This alone is reason to deny the writ of certiorari.

III.
THE UNIVERSITY OF MINNESOTA IS NOT A "PERSON" UNDER 42 U.S.C. § 1983

The Eighth Circuit Court of Appeals position holding that the University of Minnesota is not a "person" within the meaning of 42 U.S.C. § 1983 is consistent with all Eighth Circuit Court of Appeals precedent and rulings of this United States Supreme Court. As an arm of the state, the University is specifically entitled to immunity from petitioner's claims of due process and equal protection violations under 42 U.S.C. § 1983. Governmental entities that are considered "arms of the state" for Eleventh Amendment purposes are not considered persons within the meaning of § 1983. *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989). *Treleven* involved a § 1983 action and is consistent with previous Eighth Circuit decisions barring § 1983 claims against the University. *See Regents of the Univ. of Minn. v. NCAA,* 560 F.2d 352, 362 (8th Cir. 1977), *cert. denied*, 434 U.S. 978 (1977).

Petitioner suggests only to the contrary that the University of Minnesota is a "political subdivision" of the state, and thus subject to *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 98 S. Ct. 2018 (1978). Petitioner's petition ignores the fact that virtually all of the Eighth Circuit decisions on which the University relies were issued after the *Monell* decision. In addition, the Minnesota Supreme Court, which is a reasonable arbiter of the status of state entities, has recently concluded that the University of Minnesota is not a "political subdivision" of the state, but rather an arm of the state sometimes referred to as a "unique constitutional entity." *Winberg v. University of Minn.*, 499

N.W.2d 799 (1993); citing *State ex rel. Univ. of Minn. v. Chase,* 175 Minn. 259, 220 N.W. 951 (1928).

The remainder of petitioner's argument regarding the alleged creation of a property and/or liberty interest is exclusively directed towards actions of the federal defendants, over which the University of Minnesota has no control. Indeed the University has no knowledge with which to respond to the factual allegations asserted in petitioner's statement of the case, Pet. pp. 4-8, nor does petitioner even allege any fact which would suggest University involvement, knowledge, or responsibility.

Again petitioner's allegation of a conflict between the decisions of the Eighth Circuit and other circuits, as well as this court, fails to cite even one case involving the University of Minnesota in another circuit. The legal status of other public universities is irrelevant, as each decision is based on the unique circumstances of each university's creation, its state constitution, and the subsequent state law. The Eighth Circuit Court of Appeals has not wavered in its recognition of the University of Minnesota's Eleventh Amendment immunity and the conclusion that the University is not a person for purposes of § 1983, nor should this court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: June 4, 1997

Respectfully submitted,

MARK B. ROTENBERG
General Counsel
University of Minnesota
Julie A. Sweitzer
(Counsel of Record)
Acting Deputy General Counsel
325 Morrill Hall
100 Church Street S.E.
Minneapolis, MN 55455
(612) 624-4100

Attorneys for Respondent Regents of the University of Minnesota